no jurisdiction to order the accused to be detained in safe custody under s 344 of the CPC without recording a finding pursuant to s 343 read with s 342 of the CPC that the accused is of unsound mind and incapable of making his defence. Section 343(ii) of the CPC reads:

> If the Medical Superintendent shall certify that such person is of unsound mind and incapable of making his defence the Court shall, if satisfied of the fact, find accordingly, and thereupon the inquiry or trial, as the case may be, shall be postponed.

It would appear, therefore that if the learned sessions court judge is satisfied that the accused may be of unsound mind and incapable of making his defence and finds accordingly, then only shall she postpone the trial and invoke s 344 of the CPC and order the accused to be detained in safe custody as may be appropriate, otherwise she has no jurisdiction to do so under s 344 of the CPC (see *Sohoni's Code of Criminal Procedure* (17th Ed) Vol 3 at p 2959).

In the circumstances, the learned sessions court judge erred in making the order under s 344 of the CPC and in exercise of my revisionary powers, I set it aside. I order that the case be remitted to the sessions court for the plea to be taken in view of the report of the Medical Superintendent and if the plea is equivocal to proceed with the trial. It is only after the sessions court has made a finding under s 343 read with s 342 of the CPC, can the sessions court invoke s 344 of the CPC.

*Order accordingly.*

Reported by *Azra Moiz*

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# Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors

HIGH COURT (KUCHING) — SUIT NO KG 40 OF 1990
HAIDAR J
2 OCTOBER 1990

*Civil Procedure — Commencement of proceedings on behalf of company — Authority of solicitors — Burden of proof*

*Civil Procedure — Estoppel — Defendants challenging authority of solicitors to commence proceedings on behalf of company — Solicitors contending that joint-managing director of company had authorized them to commence proceedings — Defendants contending that no resolution of directors authorizing commencement of action had been passed — Defendants also contending that constitution of board of directors was invalid as against defendants — Whether defendants estopped from denying authority of joint-managing director*

*Civil Procedure — Parties — Action to redress wrong done to company or to recover money or damages due to it — Proper plaintiff*

*Companies and Corporations — Directors — Authority — Commencement of legal proceedings — Authority of director to commence proceedings in name of company — Agent of necessity — Whether power to commence proceedings delegated*

*Companies and Corporations — Resolution — Meetings of directors — Quorum — Absence from meeting of directors from certain group — Articles of association requiring presence of director from that group to form quorum — No 'disinterested' quorum present — Whether resolution valid*

*Companies and Corporations — Meetings — Quorum — Non-compliance with articles — No disinterested quorum — Allegation in legal proceedings that meeting of directors held in absence of certain directors contrary to articles of association — Absent directors not intervening to raise allegation — Allegation made by stranger to company — Absent directors interested in subject matter of resolution passed at meeting — Whether resolution valid*

*Companies and Corporations — Non-compliance with regulations of company — Powers of court — Whether court should intervene*

An action was commenced in the name of the plaintiff company challenging the decision of the first defendant acting on the direction of the second defendant to revoke a forest timber licence granted to the plaintiff company. The decision was taken following the reconstitution of the shareholding of the plaintiff company. The reconstitution was not accepted by the first and second defendants who said that this was undertaken without the approval of the licensing authority in contravention of s 2(2)(d) of the Forest Ordinance (Cap 126) of Sarawak. The shareholding was reconstituted following a joint-venture agreement which resulted in additional parties taking up shares in the plaintiff company and additional directors being appointed to the board of directors of the plaintiff company.

The defendants applied for an order, inter alia, that the action be struck out or dismissed or stayed on the following grounds:

(1) that no authority had been given by the board of directors of the plaintiff company and/or the majority of its shareholders for the action to be commenced in the name of the plaintiff company;

(2) that the action was improperly instituted in the name of the plaintiff company;
(3) that the solicitors who had commenced the action were never authorized to act for the plaintiff company; and
(4) that it was improper to maintain the action in the name of the plaintiff company.

It was contended for the plaintiff company that the solicitors had acted within their actual authority pursuant to a resolution passed at a certain meeting of the directors of the plaintiff company. The plaintiffs also argued that the directors who had been absent from the meeting had not intervened in the proceedings or tried to stop it and it was not open to strangers, namely, the defendants, to take up the issue of an invalid meeting. It was also contended that the defendants were estopped from denying that the joint-managing director concerned had authority to act on behalf of the plaintiff company in the action in that the defendants had refused to accept the reconstitution of the shareholding and board of the plaintiff company pursuant to which the 'A' directors were appointed.

**Held**, allowing the defendants' application:

(1) In an action to redress a wrong done to a company or to recover money or damages alleged to be due to it the proper plaintiff should be the company. However, in cases of urgency, the company's name may be used as the plaintiff subject to the intending plaintiffs being able to show that they have the support of the majority.

(2) The lack of authority of the solicitors to act can be challenged at any stage of the proceedings. Once the challenge has been made, the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company.

(3) Clearly there was no quorum at the meeting and the resolution purportedly passed at that meeting was invalid. Neither was there evidence that the power to institute legal proceedings had been delegated.

(4) If the court was satisfied that the plaintiff company had not acted within its powers, the court could and should exercise jurisdiction. In this case it was abundantly clear that there had been contravention of the articles of association of the plaintiff company.

(5) Whether the directors who had been absent from the meeting should or should not intervene in the proceedings to stay or to stop it was a matter for them to decide and was an irrelevant issue in the proceedings. It was open to the defendants under O 12 r 17(1) of the Rules of the High Court 1980 to question the authority of the plaintiff company to institute the present proceedings even though the defendants may be described as strangers. The issue of whether the action will lie at all should, if possible, be decided as a preliminary issue, and not left for determination at the trial.

(6) The absence of certain directors from the meeting did not mean that their absence gave the other directors the licence to proceed with the meeting and to pass the purported resolution to institute the proceedings in the plaintiff company's name as clearly their presence was necessary to constitute a proper quorum for the meeting though perhaps if it was shown that they had interests in any contract or arrangement with the plaintiff company they shall not vote and if they did so their votes shall not be counted for any resolution regarding the same in the quorum present at the meeting.

(7) The resolution, in any event, was invalid as there was no 'disinterested' quorum for the meeting.

(8) Even assuming that the joint-managing director who caused the action to be commenced could rely on implied authority, the doctrine of agent of necessity did not apply to him as he lacked the support of the majority shareholders.

(9) The allegation of estoppel must be read in the context of the non-recognition by the defendants of the reconstituted shareholding of the plaintiff company. Until the agreement was declared by the court to be invalid the additional shareholders had and continued to have rights and a say in the management of the plaintiff company and the articles of association of the plaintiff company must be adhered to by the directors and shareholders of the plaintiff company for the proceedings to be in the plaintiff company's name.

**[Bahasa Malaysia summary**

Satu tindakan telah dimulakan dalam nama syarikat plaintif untuk mencabar keputusan defendan pertama yang bertindak mengikut arahan defendan kedua untuk memansuhkan lesen pembalakan yang diberikan kepada syarikat plaintif. Keputusan itu diambil selepas pembentukan semula pemegangan saham syarikat plaintif. Pembentukan semula itu tidak diterima oleh defendan pertama dan kedua yang mengatakan bahawa pembentukan semula itu dibuat tanpa kebenaran pihakberkuasa bercanggahan dengan s 2(2)(d) Ordinan Hutan (Bab 126) Sarawak. Pemegangan saham dibentuk semula berikutan satu persetujuan usahasama yang berkesudahan dengan pihak-pihak tambahan membeli saham syarikat plaintif dan pengarah-pengarah tambahan dilantik untuk menganggotai lembaga pengarah syarikat plaintif.

Defendan memohon perintah, antara lain, supaya tindakan itu dibatal, ditolak atau ditangguhkan atas alasan-alasan berikut:

(1) bahawa tidak ada kuasa diberikan oleh lembaga pengarah syarikat plaintif dan/atau majoriti pemegang saham untuk tindakan itu dimulakan dalam nama syarikat plaintif;
(2) bahawa tindakan itu dimulakan secara tidak betul dalam nama syarikat plaintif;
(3) bahawa peguam yang memulakan tindakan itu tidak pernah diberikan kuasa untuk bertindak bagi syarikat plaintif; dan
(4) bahawa tidaklah betul untuk meneruskan tindakan itu dalam nama syarikat plaintif.

Telah dihujahkan bagi syarikat plaintif bahawa peguam telah bertindak dalam batas kuasa sebenar (actual authority) mereka mengikut satu resolusi yang diluluskan dalam suatu mesyuarat pengarah-pengarah syarikat plaintif. Pihak plaintif juga menghujah bahawa pengarah-pengarah yang tidak hadir di mesyuarat itu tidak mencelah dalam prosiding atau cuba menghentikannya dan tidaklah sesuai bagi orang luar, iaitu defendan, untuk membangkitkan isu ketidaksahan mesyuarat itu. Juga dihujahkan bahawa defendan diestop daripada menafikan bahawa pengarah urusan bersama mempunyai kuasa untuk bertindak bagi pihak syarikat plaintif dalam tindakan itu. Ini adalah kerana defendan telah enggan menerima pembentukan semula pemegangan saham dan lembaga syarikat plaintif yang berikutan dengannya pengarah 'A' dilantik.

**Diputuskan**, membenarkan permohonan pihak defendan:

(1) Dalam satu tindakan untuk membetulkan satu kesalahan yang dibuat terhadap satu syarikat atau untuk mendapat balik wang atau gantirugi yang kononnya harus diberikan kepadanya, plaintif yang betul adalah syarikat itu. Walau bagaimanapun, dalam kes-kes terdesak, nama syarikat boleh digunakan sebagai plaintif tertakluk kepada keupayaan pihak yang berhasrat menjadi plaintif menunjukkan bahawa mereka menerima sokongan majoriti.

(2) Ketiadaan kuasa peguam untuk bertindak boleh dicabar di mana-mana peringkat prosiding. Apabila cabaran dibuat, beban membuktikan bahawa guaman itu telah dimulakan dengan kuasa yang cukup terletak pada syarikat plaintif.

(3) Jelas tidak ada kuorum di mesyuarat itu dan resolusi yang kononnya diluluskan di mesyuarat itu tidak sah. Juga tidak ada keterangan bahawa kuasa untuk memulakan tindakan undang-undang telah diwakilkan.

(4) Jika mahkamah berpuashati bahawa syarikat plaintif tidak bertindak mengikut kuasa, mahkamah boleh dan harus menjalankan bidang kuasa. Dalam kes ini adalah sungguh jelas bahawa perkara persatuan syarikat plaintif telah dilanggar.

(5) Samada pengarah-pengarah yang tidak hadir di mesyuarat itu harus atau tidak harus mencelah di dalam prosiding untuk menangguhkan atau menghentikannya adalah terpulang kepada mereka dan isu itu tidak releven dalam prosiding ini. Mengikut A 12 k 17(1) Kaedah-Kaedah Mahkamah Tinggi 1980, defendan boleh mencabar kuasa syarikat plaintif untuk memulakan prosiding ini walaupun defendan boleh digelar orang luar. Isu samada tindakan itu boleh diteruskan harus, jika boleh, diselesaikan sabagai satu isu awal, dan tidak ditinggalkan untuk keputusan semasa perbicaraan.

(6) Ketidakhadiran beberapa pengarah tertentu daripada mesyuarat itu tidak bererti bahawa ketidakhadiran mereka memberi pengarah yang lain lesen untuk meneruskan mesyuarat itu dan untuk meluluskan resolusi untuk memulakan prosiding dalam nama syarikat plaintif. Ini adalah kerana kehadiran mereka diperlukan untuk membentuk kuorum yang sah untuk mesyuarat itu waluapun boleh jadi jika ditunjukkan bahawa mereka ada kepentingan di dalam mana-mana kontrak atau rancangan dengan syarikat plaintif, mereka tidak harus mengundi dan jika mereka berbuat demikian undi mereka tidak akan dikira untuk apa-apa resolusi berkenaan dengan perkara itu.

(7) Resolusi itu, apa sekali pun, adalah tidak sah kerana tidak ada kuorum yang 'tidak berkepentingan' di mesyuarat itu.

(8) Biarpun anggapan dibuat bahawa pengarah urusan bersama yang telah memulakan tindakan itu boleh bergantung kepada kuasa tersirat, doktrin ejen semasa desakan (agent of necessity) tidak terpakai kepadanya kerana beliau kekurangan sokongan majoriti pemegang saham.

(9) Alasan estopel mesti dibaca dalam konteks ketidakterimaan defendan akan pemegangan saham syarikat plaintif yang dibentuk semula. Hingga persetujuan itu dibatalkan oleh mahkamah, pemegang saham tambahan ada dan terus ada hak dalam pengurusan syarikat plaintif dan perkara persatuan syarikat plaintif mesti diikuti oleh pengarah dan pemegang saham syarikat plaintif supaya prosiding itu boleh diteruskan dalam nama syarikat plaintif.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 01-64-90.]

**Cases referred to**

1 *Airways Ltd* v *Bowen* [1985] BCLC 355 (refd)
2 *Danish Mercantile Co Ltd* v *Beaumont* [1951] 1 All ER 925 (folld)
3 *Syawal Enterprise Sdn Bhd & Anor* v *Dayadiri Sdn Bhd* [1990] 2 CLJ 297 (folld)
4 *United Investment and Finance Ltd* v *Tee Chin Yong & Ors* [1967] 1 MLJ 31 (folld)
5 *Burland* v *Earle* [1902] AC 83 (refd)
6 *Re North Eastern Insurance Co Ltd* [1919] 1 Ch 198 (folld)
7 *Avel Consultants Sdn Bhd* v *Mohd Zain Yusof & Ors* [1984] 2 CLJ 169 (distd)
8 *Marshall's Valve Gear Co Ltd* v *Manning, Wardle & Co* [1909] 1 Ch 267 (refd)

**Legislation referred to**

Companies Act 1965
Forest Ordinance (Cap 126) (Sarawak) s 2(2)(d)
Government Proceedings Ordinance 1956 s 24(3)
Rules of the High Court 1980 O 12 r 7(1)

*G Sri Ram* (*Colin Law* and *LL Kee* with him) for the plaintiffs/respondents.

*JC Fong* (*Lim Heng Choo* with him) for the defendants/applicants.

*Cur Adv Vult*

**Haidar J:** The plaintiff, Sarawak Building Supplies Sdn Bhd ('SBS') is a company limited by shares incorporated and registered in Malaysia pursuant to the Companies Act 1965 and having its registered office at No 57, Second Floor, Mission Road, Sibu, Sarawak. SBS was the holder of forest timber licence no T/3019 ('the said licence') covering an area of 64,757 acres of timber land in the Takan Pelagus area, Sarawak issued by the Director of Forests, Sarawak (first defendant) with the approval of the then Minister of Forestry (now the Minister of Resource Planning) (second defendant) pursuant to the provisions of the Forest Ordinance (Cap 126) on 28 December 1979. The said licence was valid for a period of ten years commencing from the date of issue. The third defendant is the government of the state of Sarawak. By a letter dated 11 March 1987, the first defendant on the direction of the second defendant, gave notice to SBS revoking the said licence without assigning any reason and before the expiry of the period of the said licence. Hence the filing of this writ by SBS against the defendants seeking a number of claims.

The defendants entered conditional appearance through their advocate, Mr JC Fong, who was duly authorized to act on their behalf vide authorization under s 24(3) of the Government Proceedings Ordinance 1956, as extended to Sarawak by the Modifications of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Order 1956 (LN 67 of 1965) issued by the Acting State Attorney-General (encl 8). Subsequently, the defendants filed a summons-in-chambers dated 17 April 1990 under O 12 r 7(1) of the Rules of the High Court 1980 ('RHC') for an order that:

(a) this action filed in the name of the plaintiff-company, Sarawak Building Supplies Sdn Bhd, be struck out or dismissed or stayed;
(b) the advocates on record LL Kee & Co were never or not properly authorized to act on behalf of the plaintiff-company; and

(c) the costs of and incidental to this action and to this application be paid by the advocates on record, LL Kee & Co, to the defendants.

At the hearing of the summons-in-chambers (encl 11), the defendants elected to rely only on the following grounds:

(i) no authority has been given by the board of directors of the plaintiff company and/or the majority of its shareholders for this action to be commenced in the name of the plaintiff company;
(ii) this action was improperly instituted in the name of the plaintiff company;
(iii) LL Kee & Co were never authorized to act for the plaintiff company;
(iv) it is improper to maintain this action in the name of the plaintiff company.

The paramount issue therefore is whether this action has been properly brought or should be maintained or continued in the name of SBS. Mr JC Fong concedes that the summons succeeds or fails depending on the determination of this issue by the court.

*Facts*

Initially SBS was under the control of Huang Ee Hoe and Huang Shoou Shinu ('the Huangs') as its directors when the said licence was given to SBS on 28 December 1979 by the first defendant. Subsequently on 20 May 1980 both of them entered into a joint-venture agreement (exh HEH-4) with Tiong Ik King and Tiong Thai King ('the Tiongs') inviting Tiong Ik King and Tiong Thai King or their nominees to take up 255,000 shares and such shares are described as 'A' ordinary shares and 245,000 shares are to be taken up by Huang Ee Hoe and Huang Shoou Shinu or their nominees and such shares are described as 'B' ordinary shares in SBS. The necessary amendments will be made to the articles of association of SBS on the due execution of HEH-4 to allow holders of 'A' ordinary shares the power to appoint not more than seven directors and likewise for holders of 'B' ordinary shares to appoint not more than six directors in SBS. Both the holders of 'A' and 'B' ordinary shares shall have the power to appoint a joint-managing director each and subsequently Huang Ee Hoe was appointed joint-managing director by the 'B' ordinary shareholders and Tiong Thai King was appointed the other joint-managing director by the 'A' ordinary shareholders pursuant to HEH-4. The powers and responsibilities of the joint-managing directors are spelt out under cll 4 and 5 of HEH-4. Apparently Tiong Ik King and Tiong Thai King were invited to join SBS for their 'extensive experience and expertise in hill forests logging operations and timber marketing and they also have the ability to provide or procure the technical and financial resources necessary or required for the efficient exploitation of the timber resources in the licensed area' (see cl (f) in the recital to HEH-4). The 255,000 'A' ordinary shares pursuant to cl 1(a) thereof were registered in the following names:

| | |
|---|---|
| (i) Ayu bin Amit | 42,500 shares |
| (ii) Mahathir Bin | 42,500 shares |
| (iii) Abolkassim Bin | 42,500 shares |
| (iv) Tiong Hiaw King | 77,500 shares |
| (v) Tiong Thai King | 50,500 shares |
| | 255,000 shares |

It would appear from the letter of the Director of Forests (exh HEH-8) that the reconstituted shareholding of SBS, the holder of the said licence, did not get the prior approval of the licensing authority, thereby contravening s 2(2)(d) of the Forest Ordinance (Cap 126) as cl 31 of the said licence declares the said licence to be non-transferable. In the circumstances the Forest Department said that it could not accept HEH-4 as valid or perhaps it is better, in my view, to say that it could not recognize such an agreement. Hence it was on this basis that the Forest Department asserted that it could only recognize Huang Ee Hoe as the managing director of SBS before it was reconstituted.

As a result of the views held by the Forest Department, Huang Ee Hoe and Huang Shoou Shinu (the original directors of SBS) filed Suit No 60 of 1984 in Sibu High Court seeking, inter alia, for an order that the 'A' ordinary shareholders reconvey their shares to the ordinary shareholders of SBS and that the joint-managing director and directors nominated by the 'A' ordinary shareholders resign and relinquish their posts forthwith. According to para 22 of the amended statement of claim in Suit No 60 of 1984, Huang Ee Hoe and Huang Shoou Shinu acting on their behalf and on behalf of SBS through their solicitors, on 25 April 1984, purportedly rescinded and terminated HEH-4.

Huang Ee Hoe and Huang Shoou Shinu, as plaintiffs, suing for and on behalf of themselves and all the other shareholders of 'B' ordinary shares in SBS yet filed another Suit No 54 of 1984 in the Sibu High Court against Tiong Thai King and Tiong Hiew King, Rimbunan Hijau Sdn Bhd and Tiong Toh Siong & Sons Sdn Bhd. Some of the declarations sought in Suit No 54 of 1984 would appear to overlap with some claims sought in Suit No 60 of 1984. In Suit No 54 of 1984 Huang Ee Hoe and Huang Shoou Shinu as first and second plaintiffs respectively filed a summons-in-chambers seeking, inter alia, leave to name the third plaintiff (SBS) as the fifth defendant. The learned judge in Suit No 54 of 1984 granted leave to name SBS as the fifth defendant and struck out SBS as the third plaintiff as it was said by the learned judge that on the evidence adduced there is a clear lack of authority to bring the

action in SBS's name, citing *Airways Ltd* v *Bowen*.[1] Further the learned judge went on to say at p 2 '... the case of the first and the second plaintiffs is that they are bringing this suit as a 'derivative' action, that not being in control of the company, they are unable to continue making the company a plaintiff ...'.

It now remains for me to determine the sole issue raised by the defendants, that is, whether the writ is bad for want of authority.

It is a clearly established principle that in an action to redress a wrong done to a company or to recover money or damages alleged to be due to it the proper plaintiff should be the company. The action should be commenced by the company in its corporate name. In respect of control of company's litigation, 7(1) *Halsbury's Laws of England* (4th Ed Reissue) at p 737, para 1011 states:

> As regards litigation by an incorporated company, as a rule the directors are the persons who have authority to act for the company, but in the absence of any contract to the contrary in the articles of association, the majority of the members are entitled to decide, even to the extent of overruling the directors, whether an action in the company's name should be begun or allowed to proceed. The secretary of company cannot institute proceedings in its name in the absence of express authority to do so; but proceedings begun without authority may subsequently be ratified.

However, in case of urgency, the company's name may be used as plaintiff subject to the intending plaintiffs (as the Huangs here) being able to show that they have the support of the majority (see *Danish Mercantile Co Ltd* v *Beaumont*[2] at p 930. It is not disputed that earlier on the defendants' advocate questioned the authority of LL Kee & Co to act on behalf of SBS together with the supporting resolution of SBS's board of directors (see exh 'B' in encl 11) and todate no meeting has been called to see if the majority of the shareholders support this action and this evidence remains uncontroverted. The lack of authority of the solicitors to act can be challenged at any stage of the proceedings. Once the challenge has been made the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company (see *Syawal Enterprise Sdn Bhd & Anor* v *Dayadiri Sdn Bhd*[3]). For the plaintiff, the sources of authority relied on are: (a) actual authority; (b) ostensible authority; and (c) authority to act by estoppel.

(a) *Actual authority*

The actual authority relied on was purportedly pursuant to a resolution of the board of directors meeting allegedly held on 20 February 1990 when Huang Ee Hoe in his affidavit (encl 17) at para 8 deposed:

> I further state that pursuant to the board of directors' resolution to institute this action as aforesaid, I directed LL Kee & Co to commence proceedings against the above-named defendants.

It is to be observed that nowhere in his various affidavits did Huang Ee Hoe depose that he is relying on implied or ostensible authority. The issue of actual authority is centred on the purported board of directors' meeting allegedly held on 20 February 1990 and the resolution passed thereon. In view of the facts presently before the court, was it a properly constituted meeting held on 20 February 1990 and if not, the resolution passed cannot be a valid resolution and hence anything purportedly done in pursuance thereof cannot be valid.

It is then pertinent for me to examine the articles of association of SBS (see P-1 in encl 41) in respect of the proceedings of directors and art 86 in respect of quorum is relevant and reads:

> The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. *Unless otherwise determined, two shall be a quorum. Provided always that one of the directors present is an 'A' director and the other a 'B' director respectively appointed pursuant to article 70.* Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. (Emphasis provided.)

It is not disputed that there was no 'A' director present at the alleged board meeting and there has been no resolution passed to reduce or change the quorum as prescribed by art 86 and in that event clearly there was no quorum and the resolution purportedly passed on that day is, to my mind, invalid (see *United Investment and Finance Ltd* v *Tee Chin Yong & Ors*[4] at p 35). Neither was there evidence that the power to institute legal proceedings in SBS's name was delegated to Huang Ee Hoe. In *Gore-Browne on Companies* (43rd Ed) at paras 26-3, it is stated:

> Each director has not alone power to bind the company unless he has had this power specially delegated to him. Nor can a number of the directors, even although they constitute a majority, act without meeting or at a meeting of which notice has not been given to the whole body, and acts done by the majority of board not duly convened as a board meeting (eg on the occasion of a general meeting of the company) are not valid.

The plaintiff's answer, it seems, is that the court has no jurisdiction or to put it another way, will decline jurisdiction to inquire into the domestic affairs of a corporation and relied on the case of *Burland* v *Earle*.[5] With respect, a closer examination of *Burland* v *Earle*[5] would tend to show the contrary, where it is stated under the headnote:

> It is an elementary principle that a court has no jurisdiction to interfere with the internal management of companies *acting within their powers.* (Emphasis added.)

In this case if the court is satisfied that SBS has not acted within its power as for example art 86, the court can and should, in my view, exercise jurisdiction. In this

case it is abundantly clear that there has been contravention of art 86 of SBS and there are no two ways about it.

Next, Mr Sri Ram, acting for the plaintiff company, submitted on the issue of conflict of interests by the Tiongs and their absence makes no difference and went on further to submit that the Tiongs have not intervened in this proceedings or to stop it. He went on yet further to say that this issue of properly constituted meeting of the board of directors was taken by a stranger, that is, the defendants. Before proceeding to consider the conflict of interests issue, I would say that whether the Tiongs should or should not intervene in this proceedings to stay or to stop it is a matter for the Tiongs to decide and for the present moment, I think it is an irrelevant issue in this proceedings. To further allege, as I understand it, that a stranger took this point meaning perhaps that the defendants could not take up this point would, with due respect, be erroneous as it is open to the defendants as provided under O 12 r 7(1) of RHC to question the authority of SBS to institute the present proceedings even though the defendants may be described as 'a stranger'. In fact the issue of whether the action will lie at all should, if possible, be decided as a preliminary issue, and not left for determination at the trial. (See 7(1) *Halsbury's Laws of England* (4th Ed Reissue) para 1012 at p 738.)

On the conflict of interests issue, art 82(a) of SBS is relevant for consideration. Article 82(a) reads:

> A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest in accordance with the provisions of the Act. Save as by the next following article otherwise provided, a director shall not vote in respect of any contract or arrangement in which he is interested (and if he shall do so his vote shall not be counted), nor shall he be counted for the purpose of any resolution regarding the same, in the quorum present at the meeting, *but this article shall not apply to:*
>
> (iv) any contract or arrangement with any other company in which he is interested only as a director or other officer or creditor of or as a shareholder in or beneficially interested in the shares of that company. (Emphasis added.)

Article 82(a) therefore determines when a director shall not vote on any contract or arrangement with the company. First, it would appear that the Tiongs were notified of the purported board meeting but for reasons best known to themselves they elected not to attend the meeting, but in my view, it does not mean that their absence gives the Huangs the licence to proceed with the meeting and pass the purported resolution to institute this proceedings in SBS's name as clearly their presence is necessary to constitute a proper quorum for the meeting, though perhaps, if it is shown that they have interests in any contract or arrangement with the company, ie SBS they shall not vote and if they do so their votes shall not be counted nor shall it be counted for the purpose of any resolution regarding the same in the quorum present at the meeting. In my view, if the Huangs cannot proceed with the board meeting for lack of quorum, then in order to overcome this hurdle, an extraordinary general meeting of SBS should be held to get the necessary sanction to institute this proceedings in the name of SBS. This the Huangs did not do perhaps for reasons that they are in the minority and may not be able to carry through such a resolution.

Whatever it may be, can it be said that the Tiongs have personal interests in the said licence? The Tiongs have interest in Tiong Toh Siong & Sons Sdn Bhd ('TTS') as contractor for SBS in the said licence and the subsequent documents filed show that TTS is the contractor for Sarawak Timber Industry Development Corp ('STIDC'), the new licencee of the area earlier given to SBS (see HEH-12 and HEH-13). In whatever direction the decision goes in respect of the issue on the licence in respect of the timber area in question, TTS presumably could still be the contractor. In my view, however, I cannot see, on the given facts, the conflict of interests issue raised by the Huangs as the Tiongs are not the new licencee and in any event art 82(a)(iv) is a saving provision in favour of the Tiongs where art 82(a) does not apply to them for *'any contract or arrangement with any other company in which he is interested only as a director or other officer or creditor of or as a shareholder in or beneficially interested in the shares of that company'*. (Emphasis added.)

Even assuming that there was a conflict of interests at all, it would equally apply to the Huangs as exh HEH-10 and app 11 thereto would seem to indicate. In fact in app 11 Huang Ee Hoe was trying to strike a bargain with the first defendant by proposing that a new forest timber licence covering part of the licensed area be given to his new company (see para (1)) and it clearly indicates that he was not acting in the interests of SBS as he purportedly claimed to do so. As the defendants refused to entertain his proposals he carried out his threats by filing this present proceedings. As a result Huang Ee Hoe was not a disinterested party in the passing of the purported resolution at the purported board meeting to commence this action. Hence such a resolution, in any event, is therefore invalid as there was no 'disinterested' quorum for the meeting (see *Re North Eastern Insurance Co Ltd*[6]).

(b) *Implied authority*

In respect of the submission on implied authority, it is clear from the various affidavits filed that Huang Ee Hoe did not purport to rely on such implied authority. The roles of the joint-managing directors of SBS are clearly spelt out in HEH-4 at cll 4 and 5 and clearly the

power to institute legal proceedings in the name of or on behalf of SBS was never delegated to any of the joint-managing directors. If I may say so, according to cl 11 of HEH-4 it is the duty of the first party (ie the Huangs) to arrange for a meeting with the Chief Minister together with the Tiongs (the second party) within 30 days of the date of execution of HEH-4 for the approval of the reconstituted shareholding of SBS by the Chief Minister and the failure to obtain such approval would render HEL as cancelled, null and void. There is no evidence that such action has been taken by the Huangs and this could very well be the reason for the cancellation of the said licence (see exh HEH-8). Be that as it may, Huang Ee Hoe's counsel relied on the case of *Avel Consultants Sdn Bhd* v *Mohd Zain Yusof & Ors*[7] which held that a managing director of a company has implied authority to commence legal proceedings in the name of the company. In my view, in *Avel*'s case,[7] VC George J relied more on the doctrine of agency of necessity rather than implied authority as such when his Lordship said:

> The position is that in respect of a managing director of a company apart from an implied term in his contractual relationship with the company the doctrine of agency of necessity would impose a duty on him to act on behalf of the company, and if necessary in the name of the company, to preserve the property of the company.
>
> ...
>
> Similarly, in the absence of contractual terms to the contrary it is the majority vote of the company in general that has the ultimate say in matters pertaining to the business of the company and those in command of the majority vote may function as agents of necessity to preserve the property of the company *but 'at their peril and subject to their being able to show that they have the support of the majority' (Buckley on the Companies Act* (12th Ed) at p 169*)*. (Emphasis added.)

In *Avel*'s case,[7] the managing director, and another shareholder, Abdul Halim bin Mat, held majority shares in the company and there was therefore no difficulty in applying the doctrine of agency of necessity to confer upon the managing director the implied authority to institute legal action as agent of those in the command of the majority votes. The learned judge went on further to say that there was no necessity to hold a general meeting when his Lordship said:

> And since the outcome of any motion at such a meeting (ie general meeting of the company) to cause the issue of a writ to issue was obvious and a foregone conclusion in that Johari and Abdul Halim owned or controlled more than 50% of the shares, holding such a meeting was not necessary.

Further in the case of *Marshall's Valve Gear Co Ltd* v *Manning, Wardle & Co*[8] referred to by VC George J clearly shows the application of the majority rule principle 'where the court refused to strike out a writ which had been caused to be issued without a board or general meeting decision, as the managing director controlled the majority of the shares in the company'.

In other words, the 'agents of necessity' would still have to be able to show that they have the support of the majority. In this case we have the converse situation as obviously Huang Ee Hoe conceded that the majority of the shareholders were against this action and he cannot therefore successfully claim that he was an agent of those who command the majority votes. We have also the situation here of joint-managing directors in SBS as opposed to one managing director in *Avel*'s case[7] and the powers of the joint-managing directors are clearly spelt out in HEH-4. As Huang Ee Hoe as joint-managing director relied on purported express authority which I rule is not valid as the resolution was not validly passed I do not see how he could rely on implied authority now. Even assuming that he could rely on implied authority, the doctrine of agency of necessity does not apply to him as he lacked the support of the majority shareholders. To this extent, Huang Ee Hoe himself would appear to concede in Sibu High Court Suit No 54 of 1984 when on his own volition he acknowledged that the majority was against the use of SBS's name as third plaintiff and made an application to name SBS as the fifth defendant. There is no evidence of change of such a position except that in this action he seemed to take a different stand purely perhaps to carry out his threats of court action against the defendants hoping to cow the defendants to settle this proceedings for his own personal benefit and not so much for the benefit of SBS.

That the majority shareholders would not commence legal action is not disputed here and that by itself is no excuse for Huang Ee Hoe to use SBS to institute this action. At most Huang Ee Hoe, as a minority shareholder, should have proceeded by way of a derivative action if he so wishes (see *Gower's Principles of Company Law* (4th Ed) at pp 647 and 651).

(c) *Authority to act by estoppel*

This ground can be easily disposed of as the allegation that the defendants are estopped from denying Huang Ee Hoe had authority as managing director on behalf of SBS in the present litigation must be read in the context of the non-recognition by the defendants of the reconstituted shareholding of SBS to which the first defendant clearly said there was no prior approval of the licensing authority and this contravened s 2(2)(d) of the Forest Ordinance (Cap 126) as cl 31 of the said licence declares the said licence to be non-transferable. Until HEH-4 is declared by the court to be invalid, the Tiongs have and continue to have rights and say in the management of SBS and the articles of association of SBS must be adhered to by the directors/shareholders of SBS for this proceedings to be in SBS's name. I do not see how Huang Ee Hoe can rely on this issue when it is not an issue at all. With respect, this issue is raised in order to cloud the real issues!

In the circumstances I am satisfied that this action was commenced without proper authority in the name of SBS and I would accordingly strike it out. As Huang Ee Hoe had wrongly initiated this action in SBS's name by issuing the warrant purportedly under the so-called resolution of the board to LL Kee & Co to file this writ, I think, it is only appropriate that I order that he personally bears the costs of this action and the application and I do so order.

*Application allowed.*

Solicitors: *LL Kee & Co*; *Reddi & Co.*

Reported by *PS Ranjan*

## Public Prosecutor v Wahab bin Abdullah

HIGH COURT (JOHORE BAHRU) — PERBICARAAN JENAYAH NO 10 TAHUN 1985
LC VOHRAH J
23 SEPTEMBER 1990

*Criminal Procedure — Charge — Charge in Bahasa Malaysia — Omission of certain words in statute from charge — Actual wording of statute not followed — Whether charge defective — Dangerous Drugs Act 1952, s 39B*

*Evidence — Witnesses — Discrepancy in evidence — Whether material*

*Evidence — Chemist's analysis of substance — Charge of trafficking in heroin — Whether chemist required to testify that he had weighed substance — Dangerous Drugs Act 1952, s 39B*

The accused was charged under s 39B of the Dangerous Drugs Act 1952 with trafficking in heroin. At the close of the prosecution case, counsel for the accused submitted that no prima facie case had been made out against the accused because:

(1) the accused having been charged in the national language had been charged for an offence unknown to law as the statute under which he was charged was in the English language and accordingly the charge should have been framed in the English language;
(2) the charge in any event had omitted to state whether he had been trafficking either on his own behalf or on behalf of any other person and this omission made the charge defective;
(3) the charge did not follow the actual wording of s 39B(1) of the Act because of the use of the words 'telah didapati mengedar' which accordingly made the charge defective;
(4) there was a material discrepancy between the evidence of a witness who said that there was nothing abnormal in the behaviour of the accused at the time of his arrest and the evidence of another witness who said that the accused looked suspicious before and struggled at the time of his arrest;
(5) a witness had failed to repeat in his evidence a statement he had made in his police report; and
(6) the chemist who had analysed the substance recovered from the accused had failed to state specifically in his oral evidence that he had actually weighed the granular substances found in the packets that were said to have been recovered from the person of the accused upon his arrest.

**Held**, finding the accused guilty:

(1) There was nothing in the law which prohibited an accused person from being charged with the offence in Bahasa Malaysia. In any event the purpose of a charge is to intimate to the accused the nature of the offence alleged against him and that can be expressed in any language that is understood by the accused.

(2) The words 'on his own behalf or on behalf of any other person' do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting the legality of the charge.

(3) The addition of the word 'didapati' did not make the charge ab initio defective. At the most the word was superfluous and any person charged with trafficking in heroin must first have been found doing the act.

(4) There was no material contradiction in the statements made by the witnesses that justified the conclusion that they were lying. At most the discrepancy related to a matter of detail and did not affect the essential fact that the accused was seen carrying the incriminating package in his right hand.

(5) There was no obligation on the part of the chemist to say that he had in fact weighed the granular substances. It could clearly be inferred from his oral testimony that he weighed the contents of all the packets.

**[Bahasa Malaysia summary**

Yang tertuduh dituduh di bawah s 39B Akta Dadah Berbahaya 1952 dengan mengedar heroin. Apabila kes pendakwa ditutup, peguambela bagi yang tertuduh berhujah bahawa tiada kes prima facie dibuktikan terhadap yang tertuduh kerana:

(1) yang tertuduh yang dituduh dalam bahasa kebangsaan telah dituduh untuk suatu kesalahan yang tidak dikenali dalam undang-undang sebab statut di bawah mana dia dituduh adalah bahasa Inggeris, jadi pertuduhan sepatutnya digubah dalam bahasa Inggeris;
(2) pertuduhan itu apa sekali pun telah gagal menyatakan sama ada dia telah mengedar untuk dirinya sendiri atau untuk pihak orang lain dan kegagalan ini menjadikan pertuduhan itu cacat;
(3) pertuduhan tidak mengikut perkataan sebenar s 39B(1) Akta kerana penggunaan perkataan 'telah didapati mengedar' yang menjadikan pertuduhan itu cacat;
(4) terdapat perselisihan yang material antara keterangan seorang saksi yang mengatakan bahawa tiada apa-apa yang luarbiasa dalam kelakuan yang tertuduh semasa dia ditangkap dan keterangan seorang saksi lain yang mengatakan bahawa yang tertuduh nampaknya menimbulkan rasa curiga sebelumnya dan meronta semasa dia ditangkap;
(5) seorang saksi telah gagal mengulangi dalam keterangannya suatu kenyataan yang dia buat dalam repot polis; dan
(6) ahli kimia yang mengkaji bahan yang diambil daripada yang tertuduh telah gagal menyatakan secara tertentu dalam keterangan lisannya bahawa dia telah sebenarnya menimbang bahan biji-bijian yang dijumpai dalam bungkusan yang telah dikatakan diambil daripada yang tertuduh semasa dia ditangkap.

**Diputuskan**, mendapati yang tertuduh bersalah:

(1) Tidak ada apa-apa dalam undang-undang yang melarang seorang yang tertuduh daripada dituduh dengan